



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
JUDICIAL REVIEW CAUSE NO. 35 OF 2011**

**BETWEEN:**

**THE STATE**

**-AND-**

**COMMISSIONER GENERAL OF**

**MALAWI REVENUE AUTHORITY..... RESPONDENT**

**EX-PARTE**

**COTTON GINNERS AFRICA LIMITED ..... APPLICANT**

**CORAM: THE HONOURABLE MR JUSTICE CHIRWA**

**Mr Chokhotho, of the Counsel for the Applicant**

**Mrs Mwangwela, of Counsel, for the Respondent**

**Mrs Gangata, Official Court Interpreter**

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**JUDGEMENT**

The Applicant, Cotton Ginnners Africa Limited, is a company carrying on its business in the Republic of Malawi while the Respondent is the Commissioner General of the Malawi Revenue Authority, a public

authority with powers, inter alia, to levy customs and excise duties and the enforcement of the payment thereof.

The Applicant has brought these proceedings for judicial review seeking the following reliefs.

- 1) A declaration that the decision by the Respondent to impose a penalty of K4,378,420.00 against the Applicant for alleged misclassification of goods, when the tariff used to clear the goods was advised by the Respondent's officers after inspecting the said goods, without affording the Applicant an opportunity of being heard is unfair and unconstitutional;
- 2) A declaration that the decision of the Respondent imposing a penalty of K4,378,420.00 against the Applicant for alleged misclassification of goods when the tariff used to clear the goods was advised by the Respondent's officers after inspecting the said goods is wednesbury unreasonable and therefore void;
- 3) A declaration that the Respondent's decision to reject the Applicant's appeal on the basis that an offence was committed regardless of who was behind it is wednesbury unreasonable and therefore void
- 4) An order staying the decision of the Respondent imposing a penalty of K4,378,420.00 against the Applicant for the alleged misclassification of goods;
- 5) Further or other relief, and
- 6) An order for costs.

The background of the matter is as follows: In or about February, 2011 the Applicant imported from India 400 pieces of minijuti wool

packs. The said consignment was cleared at the Respondent's Mwanza border on the 11<sup>th</sup> April, 2011 under tariff 5310.01.01 resulting in the Applicant not paying any duty thereon.

On or about 10<sup>th</sup> June 2011 the Applicant received a letter from the Respondent informing them that there were duties in the sum of K14,594,731.44 which ought to have been paid in respect of the said consignment as it ought to have been cleared under tariff 6305.10.00 and not 5310.01.01. The said letter had with it the Respondent's Form C 132 which is a form by which the Respondent indicated his satisfaction that the Applicant had committed an offence of misclassification and that proceedings could be properly taken against the Applicant but in exercise of the Respondent's powers under Section 162 of the Customs & Excise Act the Respondent was willing in lieu of taking proceedings to settle the case upon the Applicant agreeing to pay the sum of K4, 378,420.00 being the penalty. The Applicant was requested to sign the said form in agreement or refusal of the settlement.

On the 23<sup>rd</sup> June, 2011 the Applicant through its legal practitioners, wrote to the Respondent explaining how the said consignment was cleared allegedly with the guidance of the Respondent's officers and as such praying for consideration to have the penalty waived whilst at the same time indicating its willingness to pay the duties that were payable. Then on 27<sup>th</sup> June 2011 the Applicant received the Respondent's letter of even date advising the Applicant to pay duties payable whilst its appeal was being considered. And on the 17<sup>th</sup> August 2011 the Applicant was informed by its legal practitioners that the Respondent by his letter of the 9<sup>th</sup> August, 2011 had rejected

its appeal on the penalty on the basis that regardless of how the misclassification occurred, an offence had been committed.

Before I can proceed to determine the sustentative application herein, I find it necessary to determine whether or not an alternative remedy is available to the Applicant herein other than the remedy of judicial review for the Courts will not normally grant judicial review where there is an avenue of appeal. "It is a cardinal principle that, save in the most exceptional circumstances, [the jurisdiction to grant judicial review] will not be exercised where other remedies were available and have not been used" per **Sir John Donaldson M.R. in Rv Epping and Harlow General Commissioners, ex p. Goldstraw** [1983] 3 ALL ER. 257, p.262

It is the Respondent's position that there is an alternative remedy available to the Applicant other than the remedy of judicial review, to wit, the remedy of an appeal to a Special Referee under Section 121 of the Customs and Excise (Cap. 42:01). (hereinafter called "the Act"). It is thus the contention of the Respondent that instead of prosecuting the appeal further to a Special Referee in terms of Section 121, aforesaid, the Applicant has ignored the same and rushed to this Court to claim its rights.

The Applicant's response to the Respondent's contention is that Section 121, aforesaid, provides for a right of appeal to a Special Referee in cases where there is a dispute on duty and not necessarily penalties or fines. It is the submission of the Applicant that as can clearly be seen from the facts there is no dispute as regards the duty.

In the determination of this issue I think it is necessary that I reproduce the provisions of Section 121 (1) of the Act as follows:

“121(1) If a dispute arises between the owner of any goods and the Controller as to the amount of duty payable on those goods, the owner may, if he pays the amount demanded as duty by the Controller or furnishes security to the satisfaction of the Controller for the payment of that amount, within three months after the payment or furnishing of security, appeal to the Special Referee against demand.”

The wording of the foregoing provisions are, in my considered view, very clear and do not require any special interpretation whatsoever. It is apparent to me that the dispute which may be referred to a Special Referee under this section is a dispute “as to the amount of duty payable,” it is not any other dispute that may arise between the owner of the goods and the Controller. In the circumstances, I am inclined to hold that the Applicant is entitled to pursue the remedy for judicial review herein as there is no alternative remedy available to it.

Having disposed of the issue: whether or not there is an alternative remedy available to the Applicant in the negative, I think I can now safely proceed to determine the present application.

This being an application for judicial review, I remind myself that by virtue of Section 108(2) of the Constitution of the Republic of Malawi the Courts have express powers to review any law, act or conduct of government. I further remind myself that the grounds of review under Section 43 of the said Constitution are (a) lawfulness, (b) procedural fairness, (c) the giving of reasons and (d) justifiability. What this means is that a Court thus ought not to entertain any flimsy grounds like, in this case: “when the tariff used to clear the goods

was advised by the Respondent's officers after inspecting the said goods" or "regardless of who was behind (the misclassification)" etc.

I have also reminded myself that".....the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question" (see: **Chief Constable of North Wales Police v Evans** [1982] 1 W.L.R. 1155 p1160 per **Lord Hailsham L.C.**). I also take judicial notice of Practice Note Number 53/1- 14/6 of the Rules of the Supreme Court to the effect that "the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision – making process itself." (emphasis mine).

Turning to the present application, it is the Applicant's case, and this is what I have to determine, that the Applicant was never given any opportunity of being heard before the Respondent's said decision was made. It is here the Applicant's contention that no reasonable Commissioner General/Authority in the Respondent's position considering all the circumstances of this matter and acting reasonably would make/arrive at a similar decision. It is on this premise that the Applicant further contends that the Respondent's decision to impose a penalty on the Applicant regardless of the fact that the misclassification of the said consignment was due to the fault of the Respondent's own officers who inspected the same is wednesbury unreasonable. It is thus the prayer of the Applicant that the Respondent's decision imposing a penalty of K4, 378,420.00 on

the Applicant be quashed for being wednesbury unreasonable with costs.

The position of the Respondent, mainly, is that there was not any unreasonableness in the way the demand of the duty and the fine/penalty were made by the Respondent. It is the further contention of the Respondent that the liability for the payment of duty and the fine still remains with the Applicant and that the decision to reject the appeal was fair and reasonable in the circumstances owing to the nature of the Applicant's case.

It seems to me that it is not in dispute that the Applicant is the owner of the said goods. As such the Applicant has a sufficient interest to make the present application for judicial review. It is also not in dispute that the Respondent is a public authority performing public duties or functions such that judicial review may lie against him.

Now judicial review being concerned with reviewing the decision making process itself as opposed to the merits of the decision in respect of which the application for judicial review is made, it can thus not be the business of this Court to entertain such arguments as the Respondent's argument herein that the liability for the payment of duty and the fine still remains with the Applicant and that the decision to reject the appeal was fair and reasonable in the circumstances owing to the nature of the Applicant's case. The concern of this Court thus ought to be simply whether or not on the facts of this case the Applicant had received a fair treatment from the Respondent? Or put simply, whether the Respondent had

followed the principles of natural justice in arriving at his decision to impose a penalty of K4, 378,420.00 on the Applicant.

There is nothing in the Respondent's Affidavit in Opposition in this matter to show that the Respondent had given the Applicant an opportunity of being heard in its defence or required it to give an explanation as to the alleged misclassification before the decision to impose the said penalty was made. And as a matter of fact no submission was made by the Respondent both in his Skeleton Arguments and the oral submissions at the hearing of this application in this regard. In fact, it seems evident from Exhibit "F13", a letter dated 10<sup>th</sup> June, 2011 from the Respondent to the Applicant, that the Respondent proceeded to impose the said penalty on the Applicant, after discovering that there was a misclassification of the Applicant's said goods (ie after discovering that the said goods were cleared under Tariff Heading 5310.01.01 instead of 6305.10.00) following what the Respondent has termed 'the post clearance desk audit' carried out on the Applicant's imported goods. There is also no evidence to suggest that the Applicant was present when such an audit was being carried out or invited to give any explanation as to the misclassification which had been discovered by the said audit. It is in the premises, my considered view, that much as the imposition of both the duty and the penalty might be within the customs and excise laws and regulations as submitted by the Respondent, both in the Skeleton Arguments and the oral submissions, natural justice required that it should have been put precisely to the Applicant the precise offence it had was alleged to have committed and then asked to give an explanation thereto. And since this was not done, as earlier alluded to, this treatment by the Respondent falls to be an abuse by unfair treatment of a lawful authority.

In the end result therefore, I find that the Applicant's within application is merited and thus ought to be allowed. The Respondent's decision imposing a penalty of K4, 378,420.00 without giving the Applicant an opportunity of being heard is hereby quashed for being wednesbury unreasonable. I further, proceed to set aside the said penalty of K4, 378,420.00.

The Applicant will have the costs of this application.

Dated this.....14<sup>th</sup>.....day of.....November.....2013



**CHIRWA J  
JUDGE**